Nos. 84-871, 84-889, 84-1054 and 84-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Appellees.

CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF CALIFORNIA, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Appeal and on Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, THE NATIONAL GOVERNORS' ASSOCIATION, THE COUNCIL OF STATE GOVERNMENTS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did Congress, in the Federal Communications Act, grant the Federal Communications Commission the authority to order state regulatory agencies to use interstate depreciation practices in setting *intrastate* telephone rates?

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INTEREST OF *AMICI*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The court below upheld the primacy of Federal Communications Commission (FCC) regulation of interstate depreciation over state authority to regulate *intrastate* [1] rates. The FCC's decision to promote the financial interests of the communications industry strips state governments of their statutory power to oversee the state regulated non-competitive *intrastate* public communications business. The court below accepted the agency's conclusion that the "efficiency of the national communications network" is at stake. It dismissed as less important the expressed Congressional intent to preserve state regulation in this area, which has been committed to state governance by tradition as well as by statute. Such reasoning renders state regulation in any area touching on national concerns vulnerable to preemptive action by federal regulatory agencies without regard to the will of Congress and the safeguards of the political process.

[1] Throughout this brief, the word "intrastate" is italicized to facilitate its distinction from the similarly spelled word "interstate."

This Court has frequently made it plain that only Congress can authorize federal agencies to extend their regulatory sway so as to preempt state rules. If the decision below is upheld, it will have a dramatic adverse effect on the ability of states to regulate local affairs in the public interest.

For these reasons, the case is of great importance to *amici* and their members, and we are submitting this brief to aid the Court in its consideration.

STATEMENT OF THE CASE AND INTRODUCTION

Amici agree with the statement of facts submitted to this Court by petitioners California and the Public Utilities Commission of California.

This case presents a fundamental question of federal preemption by agency action in an area of established state authority. The issue is not whether the FCC acted rationally or with sufficient expertise in setting depreciation rates. Rather, the issue is whether the FCC had the power under the Federal Communications Act of 1934 to preempt the states' long-standing authority to regulate *intrastate* telephone rates. Consequently, it is of grave concern to all state and local governments.[2]

We believe that this issue is best understood in light of the historical background of the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*, (hereinafter the Act).[3] In

[2] State interest in the immediate problem presented in this case is demonstrated by the fact that about half the states are involved in these related cases as parties or intervenors. Not only these states but all states and local governments are affected by the sweep of the Fourth Circuit's opinion, *Virginia State Corporation Comm'n v. FCC*, 737 F.2d 388 (4th Cir. 1984), which encourages agency preemption despite express language preserving state authority.

[3] *See* S. Rep. No. 781, 73d Cong., 2d Sess. (1934); Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, Part 3, Federal Communications

1934, when the Act was passed, the telecommunications industry was already regulated by both federal and state governments. The states had regulated the *intrastate* telecommunication industry for many years.[4] Congress acted to consolidate the fragmented federal administrative structure which regulated the interstate aspects of the industry through the Interstate Commerce Commission and the Federal Radio Commission. Congress deliberately chose not to extend federal regulation to *intrastate* services.

As this Court had recognized, separation of *intrastate* and interstate property, revenues and expenses under the system existing at the time was not simply a "theoretical allocation" between interstate and *intrastate* service but "essential to the appropriate recognition of the competent governmental authority in each field of regulation." *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930).

In the Act, Congress consciously preserved the existing system of dual regulation. Congress wished to avoid subjecting *intrastate* communications to the sort of federal preemption that had occurred in the railway industry. While the Interstate Commerce Commission may have had jurisdiction to set depreciation schedules for telephone companies under the Interstate Commerce Act, the Commission had not exercised such authority at the time

Commission, App. A, Historical Background of the Communications Act of 1934 (1940). Federal regulation of telegraph service began with the Post Roads Act of 1866, 14 Stat. 189 (1866). In 1910 the Mann-Elkins Act, 36 Stat. 540 (1910), granted the Interstate Commerce Commission regulatory jurisdiction over interstate and foreign telegraph, telephone and cable service. The Radio Act of 1927, 44 Stat. 1162 (1927), established the Federal Radio Commission to regulate the broadcast industry.

[4] Jones, *Origin of the Certificate of Public Convenience and Necessity: Development in the States, 1870-1920,* 79 Col. L. Rev. 426 (1979).

the Federal Communications Act was adopted.[5] The Congressional Committees considering the bills were well aware that the Interstate Commerce Commission was considering the adoption of depreciation rates for telephone companies.[6] The bill was written to continue the powers which the Interstate Commerce Commission and the Radio Commission "*now exercise*[*s*] over communications, by means of definite statutory provisions," (emphasis added) so that the new Communications Commission would not be "in doubt as to its powers by reference to general legislation primarily designed for railroads."[7] In fact, the Senate Committee on Interstate Commerce deliberately chose not to incorporate into the bill the regulatory practices of the Commission which the Committee viewed as having eroded state regulation.[8]

Congress' intention to preserve dual rate regulation was honored by the FCC for more than forty years. Until it adopted the order challenged in this case, the FCC had never preempted state regulation of depreciation schedules for *intrastate* rate setting purposes. In fact, "[t]his Commission has never attempted to prevent any State commission from departing from our accounting and depreciation rules" but has "expressly recognized that

[5] *Northwestern Bell Telephone Co. v. Nebraska State Railway Comm'n*, 297 U.S. 471 (1936). The Court refused to decide the effect upon state power of federally established depreciation rates as the ICC had taken no action to establish them.

[6] *Id.* at 477-478.

[7] S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934).

[8] "We have kept in mind the fact that the Interstate Commerce Commission, through the Shreveport decision and the decisions in other similar cases, has gone so far in the regulation of railroads that the so-called 'State regulation' amounts to very little." 78 Cong. Rec. 8823 (1934). In *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914), this Court held that the Interstate Commerce Commission had the authority to control *intrastate* rail rates to prevent discrimination against interstate commerce.

State commissions have a right to do so." [9] The change announced in the FCC's January 1983 order, preempting the states' authority to set their own depreciation rates, is, therefore, an abrupt departure from previous practice.[10]

SUMMARY OF ARGUMENT

1. Congress premised the Federal Communications Act on a system of dual regulation. The states were to continue their jurisdiction over *intrastate* "charges, classifications, practices, services, facilities and regulations." 47 U.S.C. § 152(b). The Act was intended to regulate interstate and foreign communications. Nothing in the Act gives the FCC authority to regulate *intrastate* communications or to control depreciation rates to be used in calculating charges for *intrastate* service. The ordinary meaning of the language employed by Congress and the legislative history of the Act refute the claim that Congress intended to preempt state ratesetting.

The decision below virtually ignores Congressional intent and looks instead to the intent of the federal agency charged with administering the Act. An agency, however, must act within the scope of the authority granted it by Congress, and may not interpret that authority so expansively as to read out of the act Congress' own policy choice to preserve state regulation.

2. Furthermore, an intent by Congress to preempt state regulation of *intrastate* depreciation cannot be inferred from the purpose of the Act. The purpose is a general one addressed to the nationwide concern of controlling the interstate aspects of communication. Congress clearly had the power to preempt *intrastate* regulation of communications service, but chose not to do so. State laws regulating *intrastate* rates offer no obstacle to the accomplishment of the federal purpose, nor do they conflict with federal law.

[9] *In re Amendment of Part 31,* 89 F.C.C.2d 1094, 1106-1107 (1982); P. App. 82 (References in this form are to the Appendix to the Petition for Certiorari filed by California.)

[10] This departure from former practice may have been caused by the newly deregulated status of the telephone industry. The national monopoly in the telephone industry ceased to exist in 1984 following AT&T divestiture.

Whatever effect state prescribed depreciation practices have on the capital return of the interstate communication companies, whether "attenuated" or "substantial," that effect cannot justify ignoring the expressed policy choice of Congress. Appellees argue that the FCC order affects only a "single element" in the ratemaking formula. Simple arithmetic makes plain that changing any factor in a formula changes the result.

3. If the FCC and the interstate industry wish to change the law, the request should be addressed to Congress. The FCC was not delegated unrestrained authority by Congress. If it wishes to enlarge the scope of that authority, its remedy is to report to Congress and ask that the Act be amended "to define further or harmonize the powers of the Commission and of State commissions" (47 U.S.C. § 220(j)).

The scope of federal regulation is the stuff of politics. Setting its limits is inherently a political decision which should be left to the Congress where the political process can operate to protect states against the enactment of unduly burdensome laws.

ARGUMENT

I. THE FEDERAL COMMUNICATIONS ACT EXPRESSLY PRESERVES TRADITIONAL STATE AUTHORITY TO REGULATE TELEPHONE RATES.

In any preemption analysis, the first question is whether Congress intended to preempt the state regulation in question. "The purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). The preemption doctrine, which is derived from the Supremacy Clause, looks first to the expression of Congress found in the Act itself. "[W]e have no choice but to 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 105 S.Ct. 2380, 2389 (1985), citing *Park 'n Fly, Inc. v. Dollar Park and Fly, Inc.*, —— U.S. —— (1985) (slip. op. 4). *American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 508 (1981).

The stated purpose of the Federal Communications Act is to regulate "interstate and foreign commerce in communication," to make available to all the people of the United States "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. This task is to be accomplished "by centralizing authority heretofore granted by law to several agencies" and "by granting additional authority with respect to interstate and foreign commerce."

Section 152(a) makes the Act applicable to "all interstate and foreign communication by wire or radio" but is followed immediately by section 152(b), which explicitly exempts *intrastate* commerce from its scope:

> "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b).

The ordinary meaning of the foregoing language plainly reserves to the states authority to regulate the *intrastate* telecommunications industry.

Not only section 152(b) but the entire act embodies the concept of dual regulation. Section 220(b) gives the FCC authority to set depreciation rates—but only for interstate carriers. The statute makes that plain. Section 220(b) says the Commission shall "prescribe for *such* carriers" (emphasis added) the classes of property which may be depreciated and the depreciation rates. "Such carriers" are defined in section 220(a) as "carriers subject to this chapter," *i.e.*, persons engaged in "interstate or foreign communication" (Section 153(h)). Moreover, section 220(h) allows the FCC to classify "carriers", *i.e.*, interstate carriers, and, if consistent with the public interest, to except "carriers" from the act in cases where they are subject to a state commission. *Intrastate* communications and carriers are not defined in the Act for the obvious reason that Congress did not intend to sweep their regulation into the scope of the FCC's jurisdiction.

The common sense view of the matter is that Congress meant what it said and said what it meant—that "nothing in this chapter" gave the FCC jurisdiction over *intrastate* rates.

A dual regulatory system offered many advantages to Congress. It allowed each state to make policy choices affecting local interests, reduced the regulatory burden on the federal government, and reinforced the principles

of federalism and political pluralism on which this country was founded.[11]

If Congress had wished to mandate a uniform national system for the telecommunication industry, it knew how to do so. Numerous statutes unequivocally reserve certain activities to the Federal government.[12] The Congress could simply have made "the power, jurisdiction, and authority" of the FCC "exclusive with respect to all persons" licensed under the Act. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947). Whatever the merits of exclusive federal control, Congress made the policy choice to reject it, and to retain the existing system of dual regulation.

The decision below relies heavily on the general purpose language of the Communications Act which "places primary emphasis upon a rapid, efficient, Nationwide, and world-wide" communication service and finds that concern overriding.[13] But ordinary rules of statutory construction do not allow the effective excision of other sections of the statute. All sections must be read and, if possible, harmonized and followed.[14]

[11] One great advantage of retaining a dual regulatory system was expressed by Justice Brandeis in his dissent in *New State Ice Co. v. Liebman*:

> There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. 285 U.S. 262, 311 (1932).

[12] As this Court said in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947): "Congress can act so unequivocally as to make it clear it intends no regulation except its own."

[13] *Virginia State Corp. Comm'n v. FCC*, 737 F.2d 388, 392 (1984); P. App. 10.

[14] J. Sutherland, *Statutes and Statutory Construction*, § 46.05, § 46.06 (4th ed. 1975).

The court below, relying on its own decisions, and on *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), concluded that "an appellate court is not to focus *narrowly* on Congress' own intent specifically to supersede state regulation" (emphasis added) but is to determine "whether the federal agency entrusted with administering the Act meant to preempt." [15] Such a standard of analysis is breathtaking; it leaves federal agencies free to encroach on state authority at will. It is consistent neither with principles of delegation of authority nor with this Court's expression of the preemption doctrine.[16] The intent of the agency can control only if the agency is acting within the scope of its authority.[17] The mere expression of agency intention is not sufficient to give an agency authority which it does not have.

The legislative history, which petitioners California and Public Utilities Commission of California review in detail in their brief on the merits, lends strong support to the view that Congress intended, quite unambiguously, to maintain the existing system of state regulation of *intrastate* communications.

[15] *Virginia State Comm'n* at 393; P. App. 12.

[16] *Metropolitan Life Ins. Co. v. Massachusetts*, —— U.S. at ——, 105 S.Ct. at 2390; "The presumption is against preemption and we are not inclined to read limitations into federal statutes to enlarge their preemptive scope." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); the exercise of quasi-legislative authority by agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.

[17] In *de la Cuesta*, the agency's authority stemmed from its control over federally created institutions, the federal savings and loan associations. Looking to the governing statute, this Court said that it would be difficult to give the federal bank board a broader mandate. 458 U.S. at 161.

II. STATE REGULATION OF *INTRASTATE* RATES DOES NOT ENCROACH ON FCC AUTHORITY TO SET INTERSTATE RATES, NOR IS THERE A CONFLICT WITH THE CONGRESSIONAL PURPOSE.

The opinion below reads into the statute and the legislative history of the Communications Act some intent by Congress to preempt by implication the existing state regulation of *intrastate* depreciation. Even if the express language of the Act is disregarded, this attempt to find a preemptive intent lurking in the interstices of the statute must fail.

It is undisputed that the Act contains no explicit preemptive language. Preemption of state law is not favored "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Congress' intent to supersede state law may be inferred only if the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or because the act touches "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Communications Act, which is premised on dual regulation by state and federal authorities, cannot easily be read as prohibiting state regulation of *intrastate* communications or as precluding enforcement of state laws. There is a presumption, moreover, that "Congress did not intend to pre-empt areas of traditional state regulation." *Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. at ——, 105 S.Ct. at 2389.[18]

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[18] Regulation of public utilities and specifically their rates and services have "characteristically" been governed by the states. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Service Comm'n*, 461 U.S. 375, ——, 103 S.Ct. 1905, 1908 (1983). "The state concern that rates be fair and efficient represents a clear and substantial governmental interest." *PG&E v. State Energy Comm'n*, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 569 (1980), 461 U.S. 190, ——, 103 S.Ct. 1713, 1723 (1983).

Congress, when enacting legislation, frequently retains a significant role for state and local governments; for reasons rooted in the nature of American government, preemption of state law is not favored. The Federal Communications Act is not unique; many statutes contain an expression of a "national policy" to favor some goal such as the consumption of coal, the production of nuclear power, or an efficient national communications service. In such cases, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).[19] The "national policy" alone is not sufficient to overcome the Congressional intention not to preempt state law. *See Commonwealth Edison v. Montana*, 453 U.S. at 634-35; *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713 (1983); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

When Congress, as it did in the Federal Communications Act, deliberately chooses to retain state regulation, "state law is nullified to the extent that it actually conflicts with federal law," either because compliance with both laws is a physical impossibility or because the state law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." *de la Cuesta*, 451 U.S. at 153; *Hillsborough County, Florida v. Automated Medical Laboratories*, —— U.S. at ——, 105 S.Ct. at 2375.

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[19] Recently, this Court said: "[E]very subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, —— U.S. ——, 105 S.Ct. 2371, 2378 (1985).

The court below did not find that compliance with both state and federal laws is impossible. Indeed, different federal and state depreciation schedules have coexisted since the Act's passage. However, the court concluded that retention of state authority to set *intrastate* depreciation schedules may have an "attenuated" effect on "the conduct and development of interstate communications." Such an "attenuated" effect cannot justify federal preemption of state authority under an Act that expressly provides for the exercise of such authority.

The FCC's explicit authority, under Section 220(b) of the Act, to prescribe depreciation practices, extends only to interstate services. The FCC, having deregulated the interstate telephone system, now finds it necessary to provide for "adequate capital recovery" and asserts that state depreciation prescriptions for *intrastate* rate setting would frustrate the Commission's self-declared national policy.[20] Accordingly, the agency asserts that it has primary authority to prescribe depreciation practices which preempt any state authority.

This assertion of preemptive authority reads out of the statute Congress' explicit decision to maintain state authority over *intrastate* services and rates. "Though offered wide latitude in this supervision over communication by wire, the Commission was not delegated unrestrained authority." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) Congressional guidance is not lacking; not only are there "strong indications that agency flexibility was to be sharply delimited" (*id.* at 708), but Congress drew a line and forbade the agency to cross it.

The FCC finds encroachment on *its* national policy because state depreciation practices have a "substantial effect" on interstate rates which would frustrate vital national policies. If *intrastate* depreciation practices

[20] *In re Amendment of Part 31*, 92 F.C.C.2d 864 (1983); P. App. 74.

have a "substantial effect" on interstate rates, a change in those practices to meet the new federal mandate would even more clearly affect *intrastate* rates, an area reserved to state regulation.[21] The effect on *intrastate* rates will not be attenuated but direct and substantial.

Moreover, upholding the FCC's asserted authority to prescribe uniform depreciation rates would lead inevitably to uniform national rate setting. Appellees AT&T and the Bell Operating Companies contend that the FCC decision does not preempt the field of *intrastate* ratemaking because it "affects only a single element in the ratemaking equation." (Consol. Motion to Dismiss at 15) All else is to remain the province of the states. The FCC, like the camel, asks only to have its nose admitted into the tent.[22]

Ratemaking involves establishing a formula, determining the facts and setting the appropriate rates. The essential reason advanced by the FCC for preempting state depreciation practices is to generate a quicker capital return. But any factor in the state formula adopted by the states to compensate for the effects of the federally prescribed accelerated depreciation schedules would similarly interfere with the FCC's intent to increase capital recovery, and would be similarly preempted under the Commission's reasoning. The inevitable result will be continued encroachment by the FCC on the state ratemaking formulas, to ensure that the national communications industry thrives.

[21] Interstate telephone calls amount to only 3% of telephone calls made. Seventy-five percent of telephone facilities are *intrastate*. *Intrastate* service carries the load.

[22] "To evil habit's earliest wile
"Lend neither ear, nor glance, nor
smile—
"Choke the dark fountain ere it flows,
"Nor e'en admit the camel's nose."

Lydia Huntley Sigourney, *The Camel's Nose, st. 4*

III. THE QUESTION OF EXPANDING FCC JURISDICTION TO SET *INTRASTATE* RATES IS PROPERLY RESERVED TO THE CONGRESS.

The FCC action reverses a decision long ago made by Congress. The Act left control of *intrastate* ratemaking in the hands of the state commissions when it consolidated federal control of interstate communications in the FCC. The decision below, however, choosing not to "focus narrowly" on Congress' expressed intent, accepted the FCC's broad interpretation of its own authority. Such deference to an agency's interpretation of its own powers is unwarranted.

That interpretation flies in the face of the language of the authorizing statute, and contradicts well-established principles of the preemption doctrine. Moreover, it disregards this Court's instruction in *Garcia v. San Antonio Metropolitan Transit Authority,* —— U.S. ——, 105 S.Ct. 1005 (1985): "The political process insures that laws that unduly burden the states will not be promulgated." *Id.* at 1020. In promulgating the Communications Act, Congress was clearly responding to the political realities of the dual regulatory system which was already in place. It chose to maintain that system, in preference to granting the FCC jurisdiction to preempt existing state authority.

Section 220(j) of the Act instructed the Commission to "investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions" with respect to accounting and depreciation matters.[23] If the FCC or the interstate communication industry wished to expand the Commission's authority, the remedy was to report the problem to Congress, not to take unilateral agency action in an area deliberately reserved to the states.

[23] 47 U.S.C. § 220(j).

Given the statutory scheme, it is for Congress to rethink the division of regulatory authority in light of the contentions of the FCC and the telecommunications industry that the states' exercise of their reserved regulatory authority undercuts the federal objectives. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 103 S.Ct. 1713 (1983).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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